YM ORANG KAYA MENTERI PADUKA DATO' WAN AHMAD ISA SHUKRI WAN RASHIDI

V.

KWONG YIK BANK BHD. (2)

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
HASHIM YEOP SANI SCJ
MOHD. YUSOFF MOHAMED J
[CIVIL APPEAL NO. 220 OF 1987]
26 JUNE 1989

CIVIL PROCEDURE: *Overdraft facility - secured by Letter of guarantee - whether guarantor must be served with a proper demand.*

The plaintiff granted an overdraft facility of $100,000 with interest to the 1st Defendant The said facility was secured by a joint and several guarantee of the 2nd and 5th Defendants (who were directors of the 1st Defendant) in their personal capacities.

The 1st Defendant defaulted, and by a letter of demand dated 18.12.82, the plaintiff requested the 1st Defendant to settle the excess and regularise the account within 7 days and carbon copies of the said letter were sent to each of the other defendants.

Subsequently, the plaintiff commenced action against all defendants. Judgment-in-default was entered against all defendants, except the 3rd defendant, who had filed a defence to the effect that no formal letter of demand was served on him and therefore the plaintiff had no cause of action against him.

The SAR gave him unconditional leave to defend but the learned judge reversed the decision. The question in issue here is whether there must be a proper demand issued to a guarantor.

Held:

[1] Liability of the guarantor depends on the language of the letter of guarantee and the nature of the liability it creates. A guarantor is therefore entitled to insist on a rigid adherence to the terms of his obligation by the creditor, and can not be made liable for more than he has undertaken.

[2] The facts in the instant case are almost on all fours with those in *Mok Hin Wah's* case which laid down the law very clearly and should be followed. Here, the bank guarantee invariably specified that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but the demand was a condition precedent in suing the guarantor.

(Appeal allowed.)

Cases referred to:

Royal Bank of Canada v. Oram & Ors. [1978] 1 WWR 564
Royal Bank of Canada v. Ruben [1978] 48 APR 707
Mok Hin Wah v. UMBC [1987] CLJ (Rep) 219
United Prime Corporation Berhad v. Q-Built Construction (M) Sdn. Bhd & Ors. [1987] CLJ (Rep) 1048
Bradford Old Bank v. Sutcliffe [1918]2 KB 833

Esso Petroleum v. Alstonbridge Properties [1975] 1 WLR 1474

For Appellant - Mr. Lambert Rasa-Ratnam; M/s. Skrine & Co.
For Respondent - Mr. J.J. Sugunasingam; M/s. Adam & Co.

JUDGMENT

Lee Hun Hoe CJ (Borneo):

We allowed the appeal. We now give our reasons. This appeal is concerned with the question of the requirement of a proper demand to be issued to a guarantor.

The facts may be stated shortly. The plaintiffs are bankers and the 1st defendant is a housing developer. The plaintiffs granted the 1st defendant an overdraft facility of $100,000.00. Interest was to be at the rate of 15% per annum with monthly rests. The said facility was to be regularised by the 1st defendant upon demand by the plaintiffs. The said facility was secured by a joint and several guarantees of the 2nd, 3rd, 4th and 5th defendants who were directors of the 1st defendant. The guarantees were given in their personal capacities. The 1st defendant defaulted and was in breach of the said facility. Despite several reminders requesting the 1st defendant to adjust the said facility the 1st defendant failed to do so. By a demand letter dated 18th December, 1982 the plaintiffs requested the 1st defendant to settle the excess and also to regularise the account within seven days. In the said letter the plaintiffs gave notice that if the demand was not complied with they would instruct their solicitors to proceed with legal action against the 1st defendant and the other defendants. Carbon copies of the said letter was sent to each of the other defendants. All the defendants ignored the said notice. The plaintiffs then filed an action against them claiming the sum of $120,409.13 as on 28th February, 1983 with interest thereof at the contractual rate. Judgment in default was obtained against the 1st, 2nd, 4th and 5th defendants. The 3rd defendant filed a defence to the effect that no formal letter of demand was served upon him and therefore the plaintiffs had no cause of action against him. The Senior Assistant Registrar gave him unconditional leave to defend. In allowing the appeal the learned judge said he was not impressed with his line of argument. Thus the matter came before us.

The first thing to do is look at the Letter of Guarantee. The liability of the guarantor depends very much on the language of that instrument and the nature of the liability it creates. A guarantor is therefore entitled to insist on a rigid adherence to the terms of his obligation by the creditor, and cannot be made liable for more than he has undertaken.

Counsel for the 3rd defendant cited two Canadian cases, i.e. *Royal Bank of Canada v. Oram & Ors.* [1978] 11 WWR *564* & 569 and *Royal Bank of Canada v. Ruben* [1978] 48 APR 707 & 708 to support his proposition that a prior demand is a condition precedent to the creation of liability in a guarantor and depends on the precise terms of the contract. The learned judge accepted that the two Canadian cases brought out the proposition clearly. However, he pointed out that in the first case at page 569 the guarantee contained the following words:

> No suit based on the guarantee shall be instituted until demand of payment has been made ...

The same form of words also are to be found in the second case. As there are no such words in the Letter of Guarantee signed by the 3rd defendant the learned judge did not consider the proposition carried the matter very far.

After the learned judge had made his decision the 3rd defendant filed his appeal. In 1987 *Mok Hin Wah v. UMBC* [1987] CLJ (Rep) 219 was decided by this court. The 3rd defendant sent a copy of this decision to the learned judge. There the plaintiff brought a claim for

money lent to the 1st defendant under certain overdraft facilities and interest thereon. The loans were guaranteed under continuing guarantees and indemnities by the other five defendants. When the defendants defaulted in payment the plaintiff sued them. Judgment was given in favour of plaintiff. Defendants appealed.

Like our case, the notice of demand was sent to the principal debtor while the guarantors received only carbon copies of the said notice. Like our case, the main issue was whether the notice sent by the plaintiff was a proper demand under the guarantees. In allowing the appeal, Salleh Abas, then L.P, delivering the judgment of the court held that the notice of demand in this case was made only to the principal debtor and not to any of the guarantors. Further, it was held that since the bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but made the demand a condition precedent to suing the guarantor. At page 220 he stated:

> ... In our opinion, the law is very clear on this point. The respondent as creditor must prove a real demand by sending actual notice of demand to the respective guarantors. Sending a carbon copy of it as in this case is not enough. It is also not sufficient to send carbon copies of the notice meant for the borrower as in the case of *United Prime Corporation Berhad v. Q-Built Construction (M) Sdn. Bhd. & Ors.* (K.L. Civil Suit No. 7049 of *1985);* [1987] CLJ (Rep) 1048 with words 'This is a demand upon you' written against the names of the guarantors appearing in the bottom of the notice ... .

He went on to say:-

> The reason is that in the letters of guarantee the provisions about demand are a real stipulation and not mere words. Under clause 1 the guarantors are to pay 'on demand all money which now is or may during the continuance of the agreement be owing to you from the Customer(s)...' Clause 4 requires the sum guaranteed or any balance thereof to be paid with interest from the date of demand for the payment thereof. It is also stipulated at clause 11 that any demand in relation to matters aforesaid may be effectively given or made by any officer of the Bank, either served personally on the guarantors, or sent by post to or at their last known place of business. *(See Bradford Old Bank Ltd. v. Sutcliffe* [1918] 2 KB 833).

Where an obligation exists by virtue of a covenant, its extent is to be measured only by the words of the covenant. A guarantor must never be made liable beyond the precise terms of his commitment. This is important because the language of guarantees and their subject matter and the surrounding circumstances differ almost in every case.

The learned judge tried valiantly to distinguish the facts of the instant case with *Mok Hin Wah's* case [1987] CLJ (Rep) 219. He assumed that the guarantee did provide in so many words, that no suit based on the guarantee shall be instituted until demand of payment had first been made, or alternatively that there was no provision in that agreement whereby the guarantors were to be treated as principal debtors, with the result that their liability was only collateral. He referred to a passage in the judgment of Scrutton, L.J. at page 848 in *Bradford Old Bank Ltd v. Sutcliffe* [1918] 2 KB 833 to show that what is critical is the language of the instrument and the nature of the liability which it creates. The observation of Walton J. at page 1483 in the case of *Esso Petroleum v. Alstonbridge Properties* [1975] 1 WLR 1474 & 1483 was also cited in support. Lastly, he referred to his decision in *Public Bank Bhd. v. Chan Siok Lee* K.L. High Court Civil Suit No. 3599 of 1985 where there was no dispute that the guarantors were served with the proper demand.

With respect, we are unable to accept the learned Judge's construction of the guarantee and therefore we do not support his decision. The facts in the instant case are almost on all

fours with those *in Mok Hin Wah's* case [1987] CLJ (Rep) 219 which laid down the law very clearly and should be followed. The document in question, that is, the Letter of Guarantee signed by the 3rd defendant, like every other guarantee, must be construed according to the intention of the parties as expressed by the language they have employed, understanding it fairly in the sense in which it is used. This intention is best ascertained by looking to the relative position of the parties at the time the Letter of Guarantee is written, construing this guarantee according to the principle stated above we do not doubt that it is a continuing guarantee subject to certain limit.

Under clause 1 the 3rd defendant stipulates to pay the plaintiffs on demand "all moneys which now are or may during the operation of this agreement be owing to you from the customer...including interest...although the relationship of banker and customer may have ceased". Clause 4 says this is a continuing guarantee and makes clear that the guarantor is liable to the sum claimable but subject always to the limit of $100,000.00 from the date of his receiving demand for payment thereof. Clause 10 provides that any demand for payment under the guarantee may be made by any officer of the Bank or the Bank's solicitors by letter sent by post addressed to guarantor at his specified address or his last place of business or abode. It is true that Clause 14 makes each guarantor a principal debtor. But this does not mean that the guarantor is not entitled to a proper demand. After all, the 1st defendant, the principal debtor, was served with a proper demand. Why should the guarantors be treated as principal debtors and not served with the proper demand?

We are unable to agree with the views of the learned judge in this case that no antecedent demand was required to create a cause of action and the mere filing of the writ and the service thereof was a sufficient demand obliging the 3rd defendant to pay. Here the Letter of Guarantee is clear. A proper demand must be made. It is a condition precedent to establishing a claim against a guarantor.

Also found at [1989] 2 CLJ 1288